

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

ROBERT J. BALKOVEC,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

(CSA 8 026 471)

DOCKET NUMBER
PH-0831-99-0063-I-1

DATE: September 30, 1999

Robert J. Balkovec, Delmont, Pennsylvania, pro se. __

Kenneth R. Brown, Washington, D.C., for the agency. __

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 This case is before the Board upon the appellant's petition for review of the initial decision issued on March 24, 1999, that affirmed the Office of Personnel Management (OPM)'s reconsideration decision. For the reasons discussed below, we find that the petition does not meet the requirements for review at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, and AFFIRM the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant retired from Federal service under the Federal Employees' Retirement System (FERS) effective December 12, 1991. Initial Appeal File (IAF), Tab 3, Subtab 6. The appellant was unmarried at the time of his retirement. *Id.* He married on October 15, 1994. IAF, Tab 3, Subtab 5. On August 15, 1997, the appellant sought to change his annuity to provide a survivor benefit for his wife. *Id.*, Subtab 3. In a reconsideration decision issued on November 13, 1998, OPM denied his request as untimely because it was filed more than 2 years after the date of his marriage. *Id.*, Subtab 2.

¶3 The appellant appealed from OPM's reconsideration decision, alleging that he was entitled to waiver of the filing deadline based on mental incapacity. IAF, Tab 1. The administrative judge affirmed OPM's reconsideration decision,

finding that the record evidence was insufficient to establish that the appellant's mental condition affected his ability to timely request a survivor annuity for his spouse, and that there were no other grounds for waiver of the deadline. Initial Decision at 5-6, *id.*, Tab 6. The appellant has now petitioned for review. Petition for Review File (PFRF), Tab 1. OPM has responded in opposition to the appellant's petition. *Id.*, Tab 3.

ANALYSIS

¶4 An individual seeking retirement benefits has the burden of proving his entitlement to such benefits by preponderant evidence. *See Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140-41 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); *Holzman v. Office of Personnel Management*, 62 M.S.P.R. 254, 256 (1994), *aff'd*, 48 F.3d 1237 (Fed. Cir. 1995) (Table). The applicable statute and regulations provide that, where a Federal annuitant is unmarried at the time of his retirement, but marries after retirement, he may elect to provide a survivor annuity for his spouse within 2 years of his marriage. *See* 5 U.S.C. § 8339(k)(2)(A); 5 C.F.R. § 831.631(b)(1). Here, because the appellant was married on October 15, 1994, he had until October 14, 1996, to request a survivor annuity for his spouse. *Id.* Consequently, his application, filed on August 15, 1997, was nearly 1 year late.

¶5 In his appeal, the appellant alleged that he was unable to timely file his election because he was taking five different medications and was also undergoing electroshock therapy. IAF, Tab 1. An annuitant's mental incompetence, however, does not constitute a basis for waiver of the statutory requirement that he elect a survivor annuity within 2 years after his post-retirement marriage. *See, e.g., Shaughnessy v. Office of Personnel Management*, 43 M.S.P.R. 633, 637 (1990). Nothing in the language or the legislative history of 5 U.S.C. § 8339(k)(2)(A) suggests, much less indicates, that Congress intended to permit waiver of the filing deadline on the basis of the annuitant's mental condition. *See Schoemakers*

v. Office of Personnel Management, No. 98-3144, slip op. at 5 (Fed. Cir. June 22, 1999).

¶6 Where Congress intended to permit the waiver of filing deadlines for Federal annuitants because of their mental problems, it explicitly so provided. Under 5 U.S.C. § 8337(b), an application for a disability annuity must be "filed with [OPM] before the employee ... is separated from service or within 1 year thereafter." Congress further provided that

[t]his time limitation may be waived by [OPM] for an employee ... who, at the date of separation from service, or within one year thereafter is mentally incompetent[.]

Id. The statute governing the present case, 5 U.S.C. § 8339(k)(2)(A), contains no equivalent provision for waiver of the filing deadline in case of an annuitant's mental incompetence, and the Board lacks the authority to waive, on equitable grounds, requirements (including filing deadlines) that Congress has imposed as a condition to payment of Federal moneys. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434 (1990); *Schoemakers*, slip op. at 5-6; *Gressley v. Califano*, 609 F.2d 1265, 1268 (7th Cir. 1979) ("A Congressional mandate to pay statutory benefits ... leaves no discretion in the agencies ... but to limit the payment of benefits to those entitled to them.").

¶7 On petition for review, the appellant asserts that he does not recall receiving a notice of election rights from OPM. PFRF, Tab 1. OPM is required by statute to provide annuitants with annual notification of their election rights under 5 U.S.C. § 8339(k)(2). *See* 5 U.S.C. § 8339 note; *Schoemakers*, slip op. at 2-3; *Brush v. Office of Personnel Management*, 982 F.2d 1554, 1559 (Fed. Cir. 1992). OPM, however, submitted an affidavit from Ms. Mary Beth Smith-Toomey, the administrator of the contract for printing and distribution of forms and notices for OPM's retirement and insurance services. IAF, Tab 3, Subtab 2. In her affidavit, Ms. Smith-Toomey stated that: (1) General notices regarding survivor benefit elections were sent to all annuitants in December 1992, December 1993,

December 1994, and January 1996; (2) OPM's computer master annuity roll generated a tape listing all annuitants and their corresponding addresses; and (3) a notice was sent to each of the annuitants on the tape. *Id.* A copy of the notice is attached to the affidavit. *Id.* The appellant has submitted no evidence to rebut Ms. Smith-Toomey's affidavit. Accordingly, the affidavit is sufficient to establish that OPM sent the appellant the required notice of election rights. *See Schoemakers*, slip op. at 4; *Darsigny v. Office of Personnel Management*, 787 F.2d 1555, 1559 (Fed. Cir. 1986).

¶8 The appellant also appears to allege that he was denied an opportunity to speak "face-to-face with management." PFRF, Tab 1. He did not request a hearing before the Board, however, IAF, Tab 1, and he does not cite to any law, rule or regulation requiring OPM to grant him a hearing. Therefore, this contention does not provide a basis for review.

ORDER

¶9 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court

no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, <http://www.mspb.gov>.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.